Supreme Court, U.S.
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No. 94-1861

In the Supreme Court of the United States

OCTOBER TERM, 1995

GILBERT MARTINEZ MUSQUIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government improperly cross-examined petitioner about his failure to provide his exculpatory explanation to the police at the time of his arrest, before he had been given *Miranda* warnings.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Brecht v. *Abrahamson*, 113 S. Ct. 1710 (1993)	4, 7
Doyle v. *Ohio*, 426 U.S. 610 (1976)	5, 7
Fletcher v. *Weir*, 455 U.S. 603 (1982)	4, 6
Griffin v. *California*, 380 U.S. 609 (1965)	4
Grunewald v. *United States*, 353 U.S. 391 (1957)	5
Jenkins v. *Anderson*, 447 U.S. 231 (1980)	6
Miranda v. *Arizona*, 384 U.S. 436 (1966)	5
Raffel v. *United States*, 271 U.S. 494 (1926)	4
United States v. *Baker*, 999 F.2d 412 (9th Cir. 1993)	6
United States v. *Canterbury*, 985 F.2d 483 (10th Cir. 1993)	6
United States v. *Hale*, 422 U.S. 171 (1975)	5
United States v. *Henderson*, 565 F.2d 900 (5th Cir. 1978)	7
United States v. *Impson*, 531 F.2d 274 (5th Cir. 1976)	7
United States v. *Negrete-Gonzales*, 966 F.2d 1277 (9th Cir. 1992)	6
Wainwright v. *Greenfield*, 474 U.S. 284 (1986)	6
Wisniewski v. *United States*, 353 U.S. 901 (1957)	7

Statute:

21 U.S.C. 846	2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 45 F.3d 927.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1995. A petition for rehearing was denied on March 16, 1995. Pet. App. 23a-24a. The petition for a writ of certiorari was filed on May 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C 846.[1] He was sentenced to 168 months' imprisonment, to be followed by a five-year term of supervised release. Gov't C.A. Br. 2.

1. Petitioner's cousin, Robert Gatewood, a police officer who had been suspended from the Houston, Texas, Police Department, formed a plan to steal cocaine and cash from drug dealers. Beginning in January 1991, Gatewood repeatedly asked a friend, Ana Maria Jaramillo, to find out from her imprisoned son the names of Colombian dealers. Gatewood explained to Jaramillo that he and his confederates could steal drugs and money by posing as police officers, and that the Colombians would be unable to report their losses to the police. Pet. App. 2a. After her arrest in October 1991, on unrelated charges, Jaramillo agreed to cooperate with the authorities in their investigation of Gatewood. *Id.* at 3a.

On October 9, 1991, Jaramillo told Gatewood that some Colombian dealers had bought 114 kilograms of cocaine, which they had stashed in their Chevrolet Suburban truck in the parking lot of a Houston hotel. Petitioner and Steve Garza, a former Houston police officer, drove to the hotel in Garza's car, and Gatewood drove there in his own car. Gatewood called

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[1] Petitioner was acquitted on two counts of attempting to possess cocaine with intent to distribute it. His co-defendants, Robert Gatewood and Steven Garza, were convicted of conspiracy and use of a communication facility during the commission of a drug trafficking offense. Gov't C.A. Br. 2 n.1.

Jaramillo several times from his cellular phone, informing her "We're going to go after it." An undercover agent left the hotel, put a suitcase in the Suburban's trunk, drove it to a nearby shopping mall, put the keys inside the gas cap, and entered a nearby restaurant. Pet. App. 3a.

Petitioner, Garza, and Gatewood followed the Suburban to the mall. Petitioner got into Gatewood's car, and the two men pulled up alongside the Suburban. After almost two hours of surveillance, petitioner got out of Gatewood's car and walked around the Suburban, checking the tops of the tires and pulling on the door handles. Petitioner was wearing a police raid jacket and black leather gloves, and was carrying a security guard's badge, even though it was a hot day and he had never been a police officer or a security guard. Agents arrested petitioner and Gatewood, and found a loaded revolver under the driver's seat of Gatewood's car. Garza fled but turned himself in one week later. Pet. App. 3a-4a.

2. Petitioner testified at trial that he had never intended to steal cocaine from anyone; rather, his purpose in watching the Suburban had been to obtain information about a possible drug deal, which he would then provide to the DEA in return for a reward. Gov't C.A. Br. 17-18, 55. After the district court denied petitioner's motion *in limine*, the government cross-examined petitioner about his failure to volunteer that account of his activities at the time of his arrest, before his receipt of *Miranda* warnings. Pet. App. 4a; Gov't C.A. Br. 54-56.

3. The court of appeals affirmed the district court's decision to permit cross-examination of petitioner concerning his post-arrest, pre-warning silence. Pet. App. 1a-12a. The court understood this

Court's decisions in *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1716 (1993), and *Fletcher* v. *Weir*, 455 U.S. 603, 605 (1982) (per curiam), to distinguish between the use of post-warning silence, which is both unfair and unreliable because of the *Miranda* warning's implicit assurance to a suspect that his silence will not be used against him, and the use of post-arrest, pre-warning silence, which "can be highly probative precisely because it implicates no such assurances." Pet. App. 6a. Turning to the facts of this case, the court found that "a reasonable juror may have supposed that [petitioner] would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers," *ibid.*, and it concluded that the district court had acted "well within its discretion in allowing the cross-examination," *id.* at 6a-7a.

ARGUMENT

Petitioner contends (Pet. 4-9) that the Court should grant certiorari to resolve the permissibility of impeachment of a defendant's credibility with evidence of his post-arrest, pre-warning silence. Contrary to petitioner's contention, however, it is settled that a defendant's post-arrest, pre-warning silence can be highly probative, and that its use in impeachment violates no constitutional rights.

The Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and precludes the government from commenting on the silence of a defendant who asserts that right. *Griffin* v. *California*, 380 U.S. 609, 614 (1965). When the defendant takes the stand, however, "he does so as any other witness," *Raffel* v. *United States*, 271 U.S. 494, 496-497 (1926), and is "subject to cross-examination

impeaching his credibility just like any other witness," *Grunewald* v. *United States*, 353 U.S. 391, 420 (1957).

In *United States* v. *Hale*, 422 U.S. 171 (1975), this Court held, as a matter of federal evidentiary law, that the government may not impeach a defendant's credibility with evidence of his silence following his receipt of the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Noting that persons who "had just been given the *Miranda* warnings" would be "particularly aware of [their] right to remain silent," the Court found that the "failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication." *Hale*, 422 U.S. at 177. For that reason, the Court held that the defendant's silence was not "sufficiently probative of an inconsistency with his in-court testimony" to justify its admission into evidence. *Id.* at 180. The following year, in *Doyle* v. *Ohio*, 426 U.S. 610, 618 (1976), the Court held that because *Miranda* warnings implicitly assure the defendant "that silence will carry no penalty, * * * it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial."[2]

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[2] See also *Doyle*, 426 U.S. at 619 ("[I]t does not comport with due process to permit the prosecution during the trial to call attention to [the defendant's] silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.") (quoting *Hale*, 422 U.S. at 182-183 (White, J., concurring in the judgment)).

Since *Hale* and *Doyle*, the Court has made clear that the government may impeach a defendant's credibility with his failure to speak before his receipt of *Miranda* warnings. The Court has explained that the unfairness of using a defendant's silence results from the prior administration of *Miranda* warnings. That unfairness is absent when the government uses or comments on a defendant's failure to give his exculpatory account before his receipt of *Miranda* warnings. See *Jenkins* v. *Anderson*, 447 U.S. 231, 235-241 (1980); see also *Fletcher* v. *Weir*, 455 U.S. 603, 606 (1982) (per curiam) ("[W]e have consistently explained *Doyle* as a case where the government had induced silence by implicitly assuring the defendant that his silence would not be used against him."); *Wainwright* v. *Greenfield*, 474 U.S. 284, 291 (1986) ("[B]reaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires.").[3] At the same time, the Court has noted that, because it is the administration of the *Miranda* warnings that renders a suspect's

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[3] Contrary to petitioner's argument, Pet. 9-10, there is no confusion among the lower courts on the constitutional permissibility of impeachment through use of a defendant's post-arrest, pre-warning silence. In *United States* v. *Baker*, 999 F.2d 412, 415 (1993), and *United States* v. *Negrete-Gonzales*, 966 F.2d 1277, 1281 (1992), the Ninth Circuit recognized that the government may use pre-warning silence, but held that the government may not conflate the defendant's silence in pre-warning and post-warning contexts by referring broadly to the defendant's post-arrest silence. In *United States* v. *Canterbury*, 985 F.2d 483, 486 (10th Cir. 1993), the court merely applied *Doyle*, holding that the government's use of the defendant's post-warning silence violated his right to due process.

ensuing silence "insolubly ambiguous" (*Doyle*, 426 U.S. at 617), the failure to speak upon arrest before administration of such warnings—like the failure to deny any other accusation—may well be probative. *Brecht* v. *Abrahamson*, 113 S. Ct. 1710, 1716-1717 (1993).[4]

In this case, the district court correctly found that petitioner's failure to claim an innocent intent at the time of his arrest was probative of whether his trial defense had been recently fabricated. As the court of appeals noted, "a reasonable juror may have supposed that [petitioner] would have explained when confronted by the police if he was in fact trying to assist the police in catching drug dealers." Pet. App. 6a. See *Brecht*, 113 S. Ct. at 1716 ("Such silence is probative and does not rest on any implied assurance by law enforcement authorities that it will carry no penalty."); cf. *id.* at 1716-1717.[5]

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[4] That *Brecht* was a state case that came to the Court on collateral review had no bearing on the Court's determination that the defendant's pre-warning silence was probative.

[5] Petitioner's claim that the decision in this case conflicts with the Fifth Circuit's earlier decisions in *United States* v. *Impson*, 531 F.2d 274 (1976), and *United States* v. *Henderson*, 565 F.2d 900 (1978), merits no further review. This Court does not grant certiorari to resolve intra-circuit conflicts. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Moreover, as the court of appeals explained (Pet. App. 5a), *Henderson* and *Impson* "reflect hostility toward prosecutorial use of a defendant's silence" that "flourished against the backdrop of an expansive vision of a defendant's rights under the Fifth Amendment." That view has been eclipsed by the Court's later acknowledgement that the government may, consistent with due process, impeach a defendant with his post-arrest, pre-warning silence, and such

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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silence can be highly probative. See *Brecht*, 113 S. Ct. at 1716-1717.